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8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**  
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11 CARLOS PADILLA VILLA,

No. CIV S-03-1737-JAM-CMK

12 Plaintiff,

13 vs.

FINDINGS AND RECOMMENDATIONS

14 COMMISSIONER OF SOCIAL  
15 SECURITY,

16 Defendant.  
17 \_\_\_\_\_/

18 Plaintiff, who is proceeding pro se, brings this action for judicial review of a final  
19 decision of the Commissioner of Social Security under 42 U.S.C. § 405(g). Pending before the  
20 court is defendant's motion to dismiss (Doc. 10). Defendant argues that Plaintiff's complaint is  
21 untimely.

22 Plaintiff applied for social security benefits on January 19, 1999. In a decision  
23 issued on November 17, 2000, an Administrative Law Judge ("ALJ") granted benefits in part.  
24 The ALJ concluded that Plaintiff became disabled on July 31, 2000, and granted Supplemental  
25 Security Income benefits. The ALJ, however, denied Plaintiff's application for Disability  
26 Insurance benefits. On September 13, 2002, the Appeals Council denied review and the ALJ's

1 decision became the final decision of the Commissioner of Social Security. At the time the  
2 Appeals Council denied review, Plaintiff was informed that he could seek judicial review by way  
3 of a civil action filed in this court within 60 days and that he could ask the Appeals Council for  
4 an extension of time to file a civil action. Plaintiff did not seek an extension of time.

5 As Defendant notes, the United States and its agencies enjoy sovereign immunity  
6 except to the extent the government consents to be sued. See Hercules Inc. v. United States, 516  
7 U.S. 417 (1996). Section 205(g) of the Social Security Act provides a waiver of sovereign  
8 immunity as to final decisions of the Commissioner of Social Security. See 42 U.S.C. § 405(g);  
9 Schweiker v. Chilicky, 487 U.S. 412 (1988). A civil action must be commenced within 60 days  
10 after notice of the agency's final decision, or within such time as the agency may allow upon a  
11 request for an extension of time. See 42 U.S.C. § 405(g), (h). A claimant is presumed to have  
12 received notice five days after the date of the notice. See 20 C.F.R. §§ 404.901, 416.1401. The  
13 60-day time limit is a statute of limitations and is not jurisdictional. See Vernon v. Heckler, 811  
14 F.2d 1274, 1276 (9th Cir. 1987). Thus, under appropriate circumstances, it may be equitably  
15 tolled. See id. at 1278.

16 This action was initiated with a pro se application for leave to proceed in forma  
17 pauperis, received on April 25, 2003. The application was granted on August 20, 2003,  
18 whereupon Plaintiff's complaint was filed. The agency's final decision is dated September 13,  
19 2002. Plaintiff is presumed to have received notice of the decision five days later on September  
20 18, 2002. Because Plaintiff did not seek an extension of time to challenge the final decision, the  
21 time to file a civil action expired 60 days later on November 17, 2002. The earliest this action  
22 could be considered to have been commenced is April 25, 2003, when the court received his  
23 application to proceed in forma pauperis. This date is beyond the limitations period and, for this  
24 reason, Plaintiff's civil action is untimely. Plaintiff has not demonstrated any basis for equitable  
25 tolling and the court sees none presented by the procedural history of this case.

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1           Based on the foregoing, the undersigned recommends that Defendant's motion to  
2 dismiss (Doc. 10) be granted.

3           These findings and recommendations are submitted to the United States District  
4 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 20 days  
5 after being served with these findings and recommendations, any party may file written  
6 objections with the court. The document should be captioned "Objections to Magistrate Judge's  
7 Findings and Recommendations." Failure to file objections within the specified time may waive  
8 the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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10 DATED: May 20, 2009

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12 **CRAIG M. KELLISON**  
13 UNITED STATES MAGISTRATE JUDGE  
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